THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

CHARLES WILLIAM MORTON,
Grievant,

v. **DOCKET NO. 2015-0067-DOT**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

This grievance was filed by Grievant, Charles William Morton, against his employer, the Division of Highways, on July 18, 2014. The statement of grievance reads, "I am being required to complete a certification for Aggregate inspector before being awarded my TRETAS Level II which I was awarded on January 31, 2013 by order of Mr. Matt Earnest, Vice President Bridgemont Community & Technical College, West Virginia Transportation Engineering Technician Certification Board, Workforce & Economic Development. To date I have seen no 'current' policy or procedure that requires me to complete a certification specifically for Aggregate inspection before I am awarded my Level II although that is what I am being told." The relief sought by Grievant is, "[f]or DOH to submit reallocation paperwork to the DOP to reflect a Level II TRETAS certification and receive back pay with interest for the difference from TRETTR Level I and TRETAS Level II back to January 31, 2013.

A hearing was held at level one of the grievance procedure on August 21, 2014, and the grievance was denied at that level on September 12, 2014. Grievant appealed to level two on September 25, 2014, and a mediation session was held on January 23, 2015.

Grievant appealed to level three on February 5, 2015, and a level three hearing was held before the undersigned Administrative Law Judge on June 24, 2015, at the Grievance Board's Westover, West Virginia office. Grievant was represented by Jennings Stickley and Respondent was represented by Roy A. Hoffman, Esquire, Assistant Attorney General. This matter became mature for decision on July 10, 2015, on receipt of the last of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant believes that Respondent should have submitted his position for reallocation to the classification of Transportation Engineering Technician Associate, because he has achieved the certification which he believes automatically qualifies him to be placed in this classification. Grievant did not prove that this is true or that Respondent was required to submit his position for reallocation.

The following Findings of Fact are made based on the record developed at levels one and three.

Findings of Fact

1. Grievant is employed by the Division of Highways ("DOH") as a Transportation Engineering Technician Trainee ("TRET - Trainee") in the Materials Section, District 5. He has been employed by DOH for 16 years.

2. DOH's Materials Section is responsible for conducting laboratory testing on construction components, such as aggregates and asphalt, in order to assure that the components being used meet certain standards.

3. Grievant works in the laboratory at Burlington, West Virginia, assisting with monitors and lab maintenance. He is qualified to take materials samples in the field without supervision, and does so.

4. Grievant has not completed a position description form for submission to the West Virginia Division of Personnel. He believed he had been told by personnel employed by DOH that he could not do so until he acquired aggregate certification.

5. Not all DOH employees in the TRET class series work in the Materials Section. Some DOH employees in the TRET class series work in the field, and their duties are much different than those employees who work in the Materials Section.

6. The minimum qualification for a TRET Associate, as set forth in the classification specification developed by the West Virginia Division of Personnel, is "Certification as a Transportation Engineering Technician Associate by the West Virginia Transportation Engineering Technician Certification Board at Bridge Valley Community and Technical College." By letter dated February 13, 2013, Grievant was notified that he had been awarded a Level II Transportation Engineering Technician Associate certification. The classification specification does not indicate that an employee is automatically eligible for reallocation to this classification when this certification is obtained.

7. DOH has in place "Rules and Regulations," effective July 1, 2014, entitled Transportation Engineering Technician and Bridge Safety Inspector Certification Program ("Rules and Regulations"). These Rules and Regulations state that their purpose "is to provide for the certification of qualified persons as Transportation Engineering Technicians/Technologists (TRET) or Bridge Safety Inspectors (BRSFIN) and ensure proper performance of the duties of the Board of Advisors (Board)." The Rules and

Regulations further state, "[t]he Board [of Advisors] will assess the applicant's education, technical experience, and training to determine the certification level in accordance with this section." The Rules and Regulations do not state that an employee who has obtained certification is entitled to placement in the TRET Associate classification.

8. By Memorandum dated May 23, 1995, Jeff Black, then Director of DOH's Human Resources Division, transmitted the "Functional Job Descriptions for the NICET subfield of Highway Materials" to District Engineers. The Memorandum states, "[t]hese functional Job Descriptions are being offered for the purposes of promotion, job posting, performance evaluation and training." The documents attached to the Memorandum state that the "Functional Job Descriptions have been created from the more general classification specifications by the West Virginia Division of Personnel in the areas of certification utilized by paraprofessional West Virginia Department of Transportation employees enrolled in the various subfields of expertise recognized by the National Institute for the Certification of Engineering Technologies (NICET)."

9. DOH employees no longer go through NICET training. They receive their training from Bridgemont Community and Technical College. The May 23, 1995 Memorandum has not been revised to reflect this change, nor have the Functional Job Descriptions been revised since May 23, 1995.

10. The Functional Job Description for Associate Engineering Technician attached to the May 23, 1995 Memorandum lists as some general examples of work: "conducts standard sampling and field testing of the physical characteristics (such as weights, density, strength, hardness, corrosion, volume, solubility, etc.) of aggregates, metals, cements, coatings, water, or soil materials to assure compliance with standards

and specifications;" "[r]eviews and records test results and calculations for documentation purposes and collects and tests material samples from projects for compliance with standards and specifications;" and, "[r]eviews, records, enters into information system, and certifies project test data as meeting contract specifications to ensure quality control of material."

11. The Functional Job Description for Associate Engineering Technician attached to the May 23, 1995 Memorandum lists as a minimum qualification for the position, "certification as an Associate Engineering Technician - Highway Materials." It lists as a "Special Requirement," "[c]ertification as an Inspector/Technician by the Division of Highways in at least one of the following functional areas: Aggregates, Portland Cement Concrete, Asphalt Concrete, or Compaction."

12. DOH has in place a "General Information Guide for Quality Assurance Testing," revised August 2008, application to the Material Control, Soils and Testing Division. This Guide sets forth the certifications that qualify an employee to perform certain duties. It states that "[c]ertification as an Aggregate Inspector qualifies the employee, either Industry or Division, to perform sampling and/or testing of aggregates relevant to the quality control program or acceptance program respectively." In order to be qualified as an Aggregate Inspector, the employee must pass a written examination and then a practical examination.

13. DOH utilizes the Functional Job Descriptions described in the preceding Findings of Fact to determine when an employee has progressed to the point where his position should be promoted or reallocated to TRET Associate.

14. Grievant passed the written test for Aggregate Inspector, but he has been unable to pass the practical portion of the aggregate test.

15. Grievant assists in the laboratory with maintenance and monitors under close supervision, and he can and does collect samples. He cannot certify his analysis until he passes the aggregate test. Grievant's job duties remained the same after he obtained the Level II Transportation Engineering Technician Associate certification.

Discussion

Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan County Bd. of Educ*., Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ*., Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant asserted that Respondent should have submitted paperwork necessary to have his position reallocated to a TRET - Associate, when he obtained the Level II Transportation Engineering Technician Associate certification. Grievant's argument is based on his interpretation of the "Rules and Regulations," effective July 1, 2014, which discuss the certification level for employees. Respondent's argument is that Grievant works in the Materials Section, and, relying on the Functional Job Descriptions DOH has had in place since at least 1995, and the duties of employees working in the Materials

Section laboratory, Grievant cannot progress to the next level of TRET until he passes the aggregate testing. Grievant's representative repeatedly chastised Respondent for what he asserted was ignoring the "Rules and Regulations" and following an outdated, 20-year-old Memorandum. Grievant and his representative, however, did not represent that either of them possesses any expertise in the interpretation of any of the documents they relied on for their assertions, nor did they present any witnesses with such expertise to explain the applicability of the "Rules and Regulations."

Moreover, Grievant presented no statute, rule, regulation, policy, or practice, or any classification specification which supports his assertion that he must be placed in the TRET Associate classification or that Respondent is required to submit his position for reallocation. Whether Respondent should do so may, however, be evaluated using the arbitrary and capricious standard. *Good v. Div. of Highways,* Docket No. 2014-1178-DOT (May 29, 2015).

Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra (citing Arlington Hosp.*

v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Blake v. Kanawha County Bd. of Educ.,* Docket No. 01-20-470 (Oct. 29, 2001).

As part of this analysis, it is important to understand what is meant by reallocation. 143 C.S.R. 1 § 3.75 defines "Reallocation" as "[r]eassignment by the Director of Personnel of a position from one class to a different class on the basis of a significant change in the kind or level of duties and responsibilities assigned to the position." The key in seeking reallocation is to demonstrate "a significant change in the kind or level of duties and responsibilities." *Keys v. Dep't of Environmental Protection,* Docket No. 06-DEP-307 (Apr. 20, 2007)*; Kuntz/Wilford v. Dep't of Health and Human Res.*, Docket No. 96-HHR-301 (Mar. 26, 1997); *See Siler v. Div. of Juvenile Serv.*, Docket No. 06-DJS-331 (May 29, 2007). An increase in the number of duties and the number of employees supervised does not necessarily establish a need for reallocation. *Kuntz/Wilford, supra.* "An increase in the type of duties contemplated in the [current] class specification, does not require reallocation. The performing of a duty not previously done, but identified within the class specification also does not require reallocation." *Id.*

Grievant admitted that his duties have not changed. It is not unreasonable for Respondent to require Grievant to obtain aggregate certification so that he can perform testing and certify his analysis prior to requesting that Grievant be placed in the next level

in this class series. The undersigned would note, however, that if Grievant wishes to complete a new position description form, he should be allowed to do so.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievant has the burden of proving his grievance by a preponderance of the evidence. *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan County Bd. of Educ*., Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ*., Docket No. 33-88-130 (Aug. 19, 1988). A preponderance of the evidence is defined as evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

2. 143 C.S.R. 1 § 3.75 defines "Reallocation" as "[r]eassignment by the Director of Personnel of a position from one class to a different class on the basis of a significant change in the kind or level of duties and responsibilities assigned to the position." The key in seeking reallocation is to demonstrate "a significant change in the kind or level of duties and responsibilities." *Keys v. Dep't of Environmental Protection,* Docket No. 06-DEP-307 (Apr. 20, 2007)*; Kuntz/Wilford v. Dep't of Health and Human Res.*, Docket No. 96-HHR-301 (Mar. 26, 1997); *See Siler v. Div. of Juvenile Serv.*, Docket No. 06-DJS-331 (May 29, 2007). An increase in the number of duties and the number of employees supervised does not necessarily establish a need for reallocation. *Kuntz/Wilford, supra.* "An increase in the

type of duties contemplated in the [current] class specification, does not require reallocation. The performing of a duty not previously done, but identified within the class specification also does not require reallocation." *Id.*

3. Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra (citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Blake v. Kanawha County Bd. of Educ.,* Docket No. 01-20-470 (Oct. 29, 2001).

4. Grievant did not demonstrate that Respondent violated any statute, rule, regulation, policy or practice, or that he was otherwise entitled to have his position reallocated to the classification of TRET Associate. Grievant did not demonstrate that Respondent's failure to submit his position for reallocation was arbitrary and capricious.

Accordingly, this grievance is **DENIED.**

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: August 13, 2015